Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD TOMCZAK,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEROLD S. SOLOVY*
LYNNE E. MCNOWN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

12 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the judgment of the District Court when the District Court applied an erroneous legal standard to essentially undisputed material facts.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. THE DECISION BELOW IS CORRECT	6
II. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

Anderson v. *Bessemer City*, ____ U.S. ____, 84 L.Ed.2d 518 (1985)	5, 8
Branti v. *Finkel*, 445 U.S. 507 (1980)	5, 6, 7
Elrod v. *Burns*, 427 U.S. 347 (1976)	5, 6, 7
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948)	8

No. 85-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD TOMCZAK,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Donald Tomczak, First Deputy Commissioner of the Department of Water of the City of Chicago, was discharged from his position by the City in November 1983. He filed this case alleging that he had been discharged for political reasons and that his position was one for which political motivations could not be the cause for dis-

charge. The District Court ruled in Mr. Tomczak's favor on both issues. (App. 23-31.)*

The United States Court of Appeals for the Seventh Circuit reversed on the ground that Mr. Tomczak's position was exempt from the prohibition against political motivations being factors in a discharge decision. (App. 9-22.) Having concluded that politics could be considered in the discharge decision, the Seventh Circuit did not reach the issue whether Mr. Tomczak had, in fact, been discharged for political reasons, although it indicated that it would have ruled for the City on that issue as well. (App. 8-9.)**

Contrary to Mr. Tomczak's assertion, the issue decided by the Seventh Circuit—whether the First Deputy Commissioner position was exempt from the prohibition against consideration of political factors—did not turn on a choice of two plausible versions of the relevant facts. The legally material facts related to the inherent authority and responsibility of the First Deputy Commissioner position and not to Mr. Tomczak's actual performance of his job. Judged by that criterion, the evidence manifestly established that Mr. Tomczak's First Deputy position was exempt.

The relevant evidence regarding Mr. Tomczak's position is as follows. Mr. Tomczak was First Deputy Commissioner of the Department of Water when he was dis-

---

* "App." refers to the Appendix to the Petition for a Writ of Certiorari. "Tr." refers to the transcript of proceedings of the trial, which occurred on March 13, 1984.

** At the trial, no direct evidence whatsoever was adduced to show that the discharge of Mr. Tomczak was caused in any way by politics; nor was there circumstantial evidence sufficient to support such a finding. (See App. 8-9.)

charged. The City of Chicago is one of the largest municipalities in the country, and the Department of Water is one of the major departments in the City. The First Deputy Commissioner's job is one of the top 50 positions of the approximately 41,000 positions in the entire City government. Within the Department of Water, it is the second most important position, the Commissioner being the first. The First Deputy supervises and controls 1150 employees (almost half of the Department's personnel) and a $40,000,000 budget. The First Deputy is in charge of the Department in the absence of the Commissioner. Mr. Tomczak's salary as First Deputy Commissioner was $62,000 per year, the second highest among the Department's 2500 employees; only the Commissioner received more. (App. 6-7, 9-10; Tr. 53, 74, 82-84, 134, 180, 201.)

The First Deputy Commissioner position was one of importance, involving policy-making and policy-implementing activities. Subject to the ultimate authority of the Commissioner, the First Deputy was responsible for the repair and maintenance of the capital equipment in his Bureau; for capital construction for a water system serving the City; for developing new construction plans; and for preparing his Bureau's budget requests. (App. 9-11; Tr. 9, 17-18, 73, 75-77, 80, 201.)

In 1980, before the dispute over his discharge existed and before he had any reason to denigrate his own position and authority, Mr. Tomczak prepared an evaluation report about his own position. In that report, Mr. Tomczak stated that thirty percent of his job responsibilities was to plan, develop and recommend budget requirements, forty percent was to manage and execute maintenance and construction programs, twenty percent was to recommend a capital improvements program for replacements and improvements in the water distribution system, and ten per-

cent was to develop, coordinate and control activities to achieve his Bureau's short-term and long-term goals. (App. 11.) Mr. Tomczak testified that this document and similar documents accurately reflected his duties and responsibilities. (Tr. 190-191.)

The Commissioner of the Department of Water testified that, while he as Commissioner ultimately set Department policy and had final decision-making authority, he could not make policy without recommendations and input from the First Deputy Commissioner, and he frequently sought such recommendations and input. As the Commissioner put it, in formulating policy "He [Mr. Tomczak] was the second person on the way up." (Tr. 119.) The Commissioner further testified that loyalty and political affiliation were important factors for someone as highly placed as Mr. Tomczak. Mr. Tomczak had significant responsibility regarding the allocation of personnel and financial resources. Mr. Tomczak's own witness, Mr. Bower, an employee in the Department of Water, testified that the Department of Water was one of the most important departments in the City providing one of the most basic City services, that input from the First Deputy Commissioner was very important to decision-making by the Commissioner, and that personal loyalty of the First Deputy was an important factor in who should hold the position. The City's Director of Personnel testified confirming the high-level and policymaking character of the First Deputy position. (App. 10-12; Tr. 9-10, 26, 31, 36-37, 76-77, 79, 84-92, 111-114, 116, 119, 134, 142-144, 151, 201.)

Against this evidence, Mr. Tomczak's tack was to assert that he was not performing the important, substantive aspects of his job and that he was merely doing routine, "flunkie" work. (App. 10.)

SUMMARY OF ARGUMENT

This case has been fully and fairly reviewed by the Seventh Circuit, and it involves nothing worthy of further review by this Court. In line with this Court's opinions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), the Seventh Circuit correctly looked at the functions of the position in determining that politics could be considered in discharging the incumbent First Deputy Commissioner. On that central issue, which is the only legally material fact involved in this case, there was no dispute. Petitioner's focus on some factual dispute concerning his personal performance in the position is therefore misplaced because, as the Seventh Circuit correctly held, it is the inherent powers of an office, rather than the performance of the particular occupant of the office, which is controlling.

Contrary to Petitioner's assertion, the standard of review applied by the Seventh Circuit properly followed this Court's decision in *Anderson* v. *Bessemer City*, ____ U.S. ____, 84 L.Ed.2d 518 (1985), and therefore, there is no conflict with a decision of this Court. Reversal of the trial court by the Seventh Circuit was proper, and the writ should not be granted.

ARGUMENT

I. THE DECISION BELOW IS CORRECT.

The Seventh Circuit recognized that the trial court applied the wrong legal criterion and thus ignored the legally relevant facts in ruling for Mr. Tomczak. In line with this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), it is clear that, in determining whether political factors can be the cause for discharge of a public employee, it is the job that counts, not the employee's individual performance or nonperformance in the job. The Seventh Circuit stated (App. 16-17):

> This court also notes that *Elrod* and *Branti* require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. [Citations omitted.] Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance. In this court's reiteration of the *Branti* formulation, we emphasized the functions of the office involved, not the officeholder. . . .

Given this legal premise, the Seventh Circuit was clearly correct in holding that the First Deputy Commissioner position was exempt, and the trial court was clearly wrong in holding to the contrary. The First Deputy position is the second most important position in a major City department, a position ranked in the top 50 out of 41,000 City jobs. The First Deputy Commissioner was in charge of the entire department whenever the Commissioner was

absent. He was in charge of a major Bureau of the department on a daily basis, commanding 1150 workers and a $40,000,000 budget. The position inherently had broad responsibilities in developing and effectuating policy, and before he had a reason to downplay his job, Mr. Tomczak said as much. All of Mr. Tomczak's evidence, which the trial court relied upon, that he was performing merely ministerial tasks without regard to the job's inherent duties, even if believed, is legally irrelevant.* It is the duties inherent in the position which are determinative, not the functioning of the current incumbent. (App. 16-21.) There was no dispute on the basic evidence about the inherent importance and substance of the First Deputy Commissioner position.** The Seventh Circuit's ruling in favor of the City on this issue follows the decisions of this Court in *Elrod* and *Branti*.

II. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT.

As a basis for his petition, Mr. Tomczak attempts to create a purported conflict between the Seventh Circuit

---

* The arguments made by petitioner that the Seventh Circuit failed to give proper deference to the trial court's view of the credibility of the witnesses are misplaced. There was no issue of credibility germane to the key issue: the inherent powers and duties of the First Deputy Commissioner position. Indeed, the credibility gap which is relevant is Mr. Tomczak's in denigrating his top-level position.

** Once the importance of the First Deputy Commissioner position is recognized, the conclusion that it is an exempt position cannot be avoided, as Mr. Tomczak would have it, by calling the Department of Water "non-political." In city government, the planning and responsibility for the delivery of a fundamentally important city service clearly is political. The Seventh Circuit properly rejected the trial court's contrary view, which the Seventh Circuit stated was "unduly myopic." (App. 17-18.)

and a recent decision of this Court where none, in actuality, exists.

Earlier this year, this Court issued its decision in *Anderson* v. *Bessemer City*, ____ U.S. ____, 84 L.Ed.2d 518 (1985), which further explained the correct standard of review to be applied by appellate courts in regard to findings of fact by trial courts. This Court concluded that an appellate court could not meet the clearly erroneous standard, if between two plausible views of the facts, the trial court chose the one which the appellate court itself would not have chosen. In *Anderson*, this Court did not repudiate the other principles concerning the standard of review which are set forth in its prior decisions, such as *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948).

The Seventh Circuit was fully aware of *Anderson* when it decided this case, Mr. Tomczak having promptly brought *Anderson* to the court's attention. The Seventh Circuit neither stated that it would not follow *Anderson*; nor did it articulate a standard of review which was inconsistent with *Anderson*. Rather, the Seventh Circuit explicitly cited and relied on *Anderson*. (App. 13.)

No error should be inferred from the Seventh Circuit's citation of *United States Gypsum Co.* (App. 13.) Indeed, this Court in *Anderson* cited *United States Gypsum Co.* as having enunciated the "foremost" principle on the issue of the appropriate standard of review. *Anderson* is an elaboration on the application of that principle. These two decisions are to be read and applied together, which is what the Seventh Circuit did. Thus, there is no conflict with any decision by this Court.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

JEROLD S. SOLOVY*
LYNNE E. MCNOWN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Respondent

* Counsel of Record

Dated: October 11, 1985